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No. 634

In the Supreme Court of the United States

October Term, 1959

GEORGE H. BRASIER, *Petitioner,*

vs.

CITY OF TULSA, OKLAHOMA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Tenth Circuit.

GEORGE H. BRASIER, *pro se.*

January 7, 1960.

Ph. LU 3-5892 GUYETTE-ATKINS Wright Building Tulsa, Okla.

INDEX

Judgment and Opinion Below 1

Jurisdiction 2

Question 2

The Laws 2

Statement 2

Reasons for Granting the Writ 4

Material Issue or Question of Fact 5

Conclusion 6

Appendix A 7

TABLE OF CASES.

Frederick Hart & Co. v. Recordgraph Corp., C. C. A. 3d, 1945, 151 F. 2d 534, 535 4

Reynolds Metals Co. v. Metals Disintegrating Co., D. C. N. J. 1948, 8 F. R. D. 349, affd. 176 F. 2d 90 4

Screws v. United States, 325 U. S. 91, 89 L. ed. 1495, 1508 6

AUTHORITIES CITED.

Barron and Holtzoff, Federal Practice & Procedure, Vol. 3, Sec. 1235.1 4

City of Tulsa Ordinance No. 7110, Sec. (b) 5

Federal Rules of Civil Procedure, Rule 56(e) 4, 6

Title 28 U. S. C. 1254 2

Title 28 U. S. C., Secs. 1331, 1343, 1356 2

Title 42 U. S. C., Secs. 1983, 1985, 1986 2

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GEORGE H. BRASIER, *Petitioner,*

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CITY OF TULSA, OKLAHOMA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Tenth Circuit.

The herein petitioner, George H. Brasier, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Tenth Circuit entered in the instant controversy on June 23, 1959.

Judgment and Opinion Below.

The judgment of the District Court was entered on November 7, 1958 (R. 10). The opinion of the Court of Appeals is reported at 268 F. 2d 558, and appears at page 3 of the appellate record.

Jurisdiction.

The judgment of the Court of Appeals was entered June 23, 1959 (App. R. 6), rehearing denied August 27, 1959 (App. R. 11). This Court granted an order November 25, 1959, extending the time to file petition for writ of certiorari to and including January 8, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Question.

Whether material issue or question of fact existed under the aspects of the action, as revealed by the record, forming a basis for federal jurisdiction of the instant controversy, pursuant to the Civil Right Acts and/or Seizure Act.

The Laws.

The pertinent provisions of the Constitution, Statutes and purported Ordinance involved are set forth in Appendix A.

Statement.

Petitioner, a resident of Tulsa, Oklahoma, lodged in the United States Court for the Northern District of Oklahoma, a complaint against the City of Tulsa, Oklahoma, a municipal corporation, and certain officers thereof, unknown and each of them, under Title 28 U. S. C., Sections 1331, 1343 and 1356, in an action for compensatory and punitive damages pursuant to Title 42 U. S. C., Sections 1983 (R. 20), 1985 and 1986, for the alleged unlawful seizure and conversion of his Packard automobile, without notice, on July 10, 1958, by officers and tow-in agent

(R. 23), under color of law and/or office. That said seizure and conversion was had by reason of conspiracy with wilful and malicious intent to deprive petitioner of his property, and to cause him damage and humiliation, and to deprive him of his Civil Rights, because of the results of his victory over the local police on a false charge referred to as Exhibit A wherein he was adjudged "not guilty" (R. 27), under a purported policy requiring three (3) or more violations (R. 2-5).

Defendant, City of Tulsa, filed a motion to dismiss upon the grounds that the court had no jurisdiction over the person or subject matter; and that the complaint did not allege sufficient facts to constitute a cause of action against defendant (R. 5-6).

At the hearing on the City's motion to dismiss, petitioner moved the court to continue the hearing to a subsequent date and require defendant City to answer certain interrogatories propounded by petitioner, and to treat said motion as a motion for summary judgment, and for leave to file showing and Exhibit B. This the court granted and continued said hearing (R. 12-15).

At the subsequent hearing defendant, City, contended that even though the function of the City was proprietary, no cause of action was stated; because the City could not conspire or participate directly or indirectly in a conspiracy, and stood upon its answers to petitioner's propounded interrogatories that the ordinance only required two (2) violations, and that petitioner was notified about the matter, and he refused to do anything, obviously desiring a lawsuit (R. 16-20). Petitioner stood upon his

pleading allegations and contended same stated his cause of action (R. 20), and that same was not predicated on the validity of the Ordinance.

On the basis of the foregoing, the District Court concluded the motion to dismiss should be treated as a motion for summary judgment, and found that there was no genuine issue as to any material fact and that summary judgment as a matter of law should be entered for defendant (R. 10-11). The Court of Appeals affirmed the judgment of the District Court (App. R. 6).

Reasons for Granting the Writ.

1. The aspects of the instant controversy reduced to the lowest denominator, as shown by the record, exemplifies that the decision of the court below is in express conflict, in effect, with the decision of the Court of Appeals for the Third Circuit[1], holding that a pleading allegation creates a fact issue, under Rule 56(e) of the Federal Rules of Civil Procedure, not to be treated as sham and adjudicated in advance of a trial through the technique of carefully-drafted written statements, escaping the clarifying processes of cross-examination.

It appears that the court below has treated petitioner's pleading allegations as being without legal probative force, as to controlling issue, as construed or found by the Court in its opinion:

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1. *Frederick Hart & Co.* v. *Recordgraph Corp.* C. C. A. 3d, 1945, 151 F. 2d 534, 535, and *Reynolds Metals Co.* v. *Metals Disintegrating Co.* D. C. N. J., 1948, 8 F. R. D. 349, affirmed 176 F. 2d 90, also see Barron and Holtzoff, Federal Practice & Procedure, Vol. 3, Sec. 1235.1.

"Whether or not appellant has been wronged can only be determined by an interpretation of the constitutionality of the cited ordinance. We express no present opinion upon the question for the issue was not presented by the pleadings to the trial court and appellant stated in open court that he was not attempting to question the validity of the ordinance in the instant action."

Petitioner verily believes and contends that the lower court has erred in holding that no material issue or question of fact existed in the instant action.

Material Issue or Question of Fact.

Whether the officers and tow-in agent, Superior (R. 23), were acting pursuant to Ordinance No. 7110, Section (b), requiring two (2) or more violations as stated in the City's answer to petitioner's propounded interrogatories (R. 6); or acting pursuant to a policy requiring three (3) or more violations as alleged in the complaint (R. 3).

Petitioner has stood on his pleading allegations, contending that the officers and tow-in agent were acting under a policy, which is obviously not within the scope of the ordinance, and that said seizure and conversion constituted civil double-jeopardy, which, in effect, violates the equal protection and due process clauses of the Federal Constitution, further, the policy itself, notwithstanding double-jeopardy, is an unlawful taking of property repugnant to the due process and compensation clauses of the Fourteenth Amendment; the taking of property in an attempt to coerce the payment of an unliquidated claim

of doubtful origin, against a solvent citizen, which, in effect, constitutes dry land piracy—a commercial blackmail and extortion racket that is patently unconstitutional.

2. The decision of the court below appears to be in direct conflict with the decision of this Court[2], wherein it was held:

> "It is clear that under 'color' of law means under 'pretense' of law. * * * [A]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the state in fact authorized, the words 'under color of law' were hardly apt words to express the idea."

3. The issue presented by the instant action is one of continuing importance with respect to Rule 56 of the Federal Rules of Civil Procedure. Unless the question of fact issue is resolved by this Court, the conflicting decisions of the Circuits will tend to further the present confusion and inequities under Rule 56 (e) as it now stands. Petitioner verily believes the Third Circuit Rule is correct.

Conclusion.

Pettioner verily believes that he has shown this Honorable Court a matter of continuing importance that should be resolved by granting the instant petition for a writ of certiorari.

Respectfully submitted,

GEORGE H. BRASIER, *pro se.*

January 7, 1960.

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2. *Screws* v. *United States*, 325 U. S. 91, 89 L. ed. 1495, 1508.

APPENDIX A.

CONSTITUTIONAL PROVISIONS.

Amendment 14, Section 1:

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES.

28 U. S. C. 1331. Federal Question; amount in Controversy; * * *:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U .S. C. 1343. Civil Rights and Elective Franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U. S. C. 1356. Seizures Not Within Admiralty and Maritime Jurisdiction:

The district courts shall have original jurisdiction exclusive of the courts of the States of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction.

42 U. S. C. 1983. Civil Action for Deprivation of Rights:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceedings for redress.

42 U. S. C. 1985. Conspiracy to Interfere With Civil Rights—* * * Depriving Persons of Rights or Privileges:

(30) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of the equal privileges and immunities under the law; * * *; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having exercised any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U. S. C. 1986. Same; Action for Neglect to Prevent:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for

all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action: * * *.

Ordinance 7110, Section (b):

(b) No person, owner or operator shall park, drive or permit to be parked or permit to be driven any vehicle which has two or more traffic summons against it, such summons having been disregarded and unpaid. Any vehicle with two or more traffic summons unpaid and outstanding against it is hereby declared a public nuisance and may be impounded by the Police Department and released only on proof of ownership and payment in full of the storage and tow-in charges and the posting of suitable bond, approved by the Judge of the Municipal Court as surety for court appearance when such bond is required.

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GEORGE H. BRASIER, - - - - - Petitioner

vs.

CITY OF TULSA, OKLAHOMA - - - Respondent

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

Charles E. Norman
City Attorney
Luther P. Lane
Finis Smith
Darven L. Brown
Henry Kolbus
John W. Sublett

INDEX

STATEMENT OF CASE 1

ARGUMENT 2

PROPOSITION No. 1 2

The Municipality could not be guilty, as a matter of law, of a conspiracy while acting in a governmental capacity.

Authorities

1. Ex parte Duncan, 179 Okl. 353, 65 P. 2d. 1015. 2
2. McGuire v. Wilkerson, 22 Okl. Cr. 36, 209 P. 445. 2
3. 174 Okl. 416, 50 P. 2d. 712, Savage v. City of Tulsa. 2
4. Bottone v. Lindsley, et al., 170 Fed Rep. 2d. 705, 10th Cir. 2
5. Agnew v. City of Compton, 239 F. 2d. 226 (Cal. 9th Cir.). 77 S. Ct. 868, 1 L. ed. 910, 353 U.S. 969. 2
6. Cobb v. City of Malden, et al. 202 F. 2d. 701 (Mass., 1st Cir.) 3
7. Hewitt v. City of Jacksonville, (Fla., 5th Cir.) 188 F. 2d. 423. 72 S. Ct. 58, 96 L. ed. 631, 242 U.S. 835. 3

PROPOSITION No. 2. 3

This Court will not pass on questions not raised or dealt with by the Court of Appeals. The question of the validity and constitutionality of the ordinance was not raised and, therefore, was not passed on by the Court of Appeals.

Authorities

1. Owens v. Union Pac. R. Co., Wash. 1943, 63 S. Ct. 1271, 319 U. S. 715, 87 L. Ed. 1683, certiorari denied 65 S. Ct. 57, 323 U. S. 740, 89 L. Ed. 593. 3
2. Sonzinsky v. U.S., Ill. 1937, 57S. Ct. 554, 300 U.S. 506, 81 L. Ed. 772. 3

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STATEMENT

Petitioner pitched his right to recover the exhorbitant damages prayed for upon the theory that the Civil Rights Acts were applicable and that the City was guilty of a conspiracy to deprive him of his automobile. The Civil Rights Acts, in the main, have to do with intimidating jurors and keeping Negroes from voting.

Petitioner did not challenge the validity or constitutionality of the ordinance, which impounded his automobile as a nuisance, either in the Trial Court or the Court of Appeals. On the contrary, he affirmed in open court at the trial—page 20 of the transcript—that he did not question the constitutionality of the ordinance. He did likewise in his oral argument in the Court of Appeals, as is set forth in the Opinion of that Court. Petitioner dealt in glittering generalities, made reference to the 'Due Process' Clause of the Constitution, but failed to show wherein same was applicable to him in this conspiracy suit for damages.

The Trial Court required the City to file answers to all interrogatories. The answers were clear and definite. These show beyond cavil the violations of the ordinance, after warning, called

for action upon the part of the policeman in the discharge of his duty. Petitioner had plain, adequate and complete remedies. He elected not to defend in the Municipal Court. He elected not to put up $20.00 which is the maximum bond on violations of this kind in the Municipal Court. He elected not to bring a replevin suit or a conversion suit. He elected not to challenge the validity of the ordinance in either State or Federal Court, but sought large money judgment because of an alleged conspiracy on the part of the Mayor and the Commission, acting upon the part of the City of Tulsa, to deprive him unlawfully of his automobile. Nothing could have been farther from the truth. The City's position was so recognized and approved by the Trial Court and the Appellate Court. The petitioner stood as any other citizen, amenable to the Law and Order of the City of Tulsa in his unlawful use of his automobile.

ARGUMENT

Proposition 1. The Municipality could not be guilty, as a matter of law of a conspiracy while acting in a governmental capacity.

Both the Trial Court and the Appellate Court have ruled adversely to petitioner. The decisions so holding are:

1. Ex parte Duncan, 179 Okl. 353, 65 P. 2d 1015
2. McGuire v. Wilkerson, 22 Okl. Cr. 36, 209 Pac. 445
3. 174 Okl. 416, 50 P. 2d 712, Savage v. City of Tulsa
4. Bottone v. Lindsley, et al., 170 Fed. Rep. 2d 705, 10th Cir. This decision quoted again by Court in its present Opinion.
5. Agnew v. City of Compton, 239 F. 2d 226 (Cal. 9th Cir.)

This case was taken to the Supreme Court of the United States by a writ of certiorari, on the 13th day of May, 1957, same was denied. 77 S. Ct. 868, 1 L. ed. 910, 353 U. S. 969. The Civil Rights Acts were invoked in this case.

6. Cobb v. City of Malden, et al., 202 F. 2d 701 (Mass., 1st Cir.).

7. Hewitt v. City of Jacksonville, (Fla., 5th Cir.) 188 F. 2d 423. A writ of certiorari was denied.. 72 S. Ct. 58, 96 L. Ed. 631, 242 U. S. 835.

Proposition 2. This Court will not pass on questions not raised or dealt with by the Court of Appeals. The question of the validity and constitutionality of the ordinance was not raised and, therefore, was not passed on by the Court of Appeals.

Owens v. Union Pac. R. Co., Wash. 1943, 63 S. Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, certiorari denied 65 S. Ct. 57, 323 U.S. 740, 89 L.Ed. 593.

Sonzinsky v. U. S., Ill. 1937, 57 S.Ct. 554, 300 U.S. 506, 81 L. Ed. 772.

Respondent therefore respectfully suggests that the Petition herein for Writ of Certiorari should be denied.

Respectfully submitted,

Charles E. Norman
City Attorney

Luther P. Lane
Finis Smith
Darven L. Brown
Henry Kolbus
John W. Sublett

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REPLY BRIEF OF PETITIONER.

GEORGE H. BRASIER, *pro se.*

February, 1960.

Wright Building GUYETTE—ATKINS Tulsa, Oklahoma

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REPLY BRIEF.

Respondent's objection to petitioner's petition for a writ of certiorari presents complexities as to material and genuine issues of fact and law, not advocated by petitioner, to the extent that a reply is most imperative and important in the interest of equitable and lawful justice.

ARGUMENT.

Respondent has such faith in the ancient medieval maxim "the king can do no wrong" that by mesmeric effect, is attempting to lull this Court into ignoring the fundamentals of American Jurisprudence.

Respondent has attempted to inject, under Proposition I of its objection to the instant petition for a writ of certiorari, that it was acting in a governmental capacity, citing seven (7) cases in support of said proposition. Petitioner submits that the question under said proposition is not a question of law until such time as the question of, or issue of fact has been determined by trial. There is nothing in the record that establishes whether defendant City was functioning in a governmental capacity. The record does show issues of, or questions of fact that are not material until such time as they are determined by trial.

In *Ex parte Duncan*, 179 Okl. 353, 65 P. 2d 1015, the Supreme Court of Oklahoma simply held that 47 Okla. Ann., Section 12, implies the power to exact a fee of sufficient amount to cover expenses of the proper exercise of that power; and Oklahoma City parking meter ordinance held valid, where they appear to be bona fide police regulations on their face, and there is no showing that the city is making unjust profits and is resorting to their use for the purpose of raising revenue and not regulation. The balance of respondent's citations also deal in issue of law and are not material at this stage.

Under the City's Proposition 2 petitioner admits that he did not raise the validity and constitutionality of the ordinance, however, petitioner does urge that he did challenge the policy and the act of the seizure and conversion of his property as being violative of the double jeopardy, due process, equal protection and compensation clauses of the Fourteenth Amendment to the Federal Constitution.

What petitioner has actually asked this Court to do is to grant the petition for the purpose of determining whether the record shows issues of or questions of fact to be tried, forming a basis for federal jurisdiction of the instant controversy, pursuant to the Civil Rights Acts and or Seizure Act.

As a basis for further clarification, petition argues, that the record shows triable issues of or question of fact, and should petitioner prove his pleading allegations, the record would then show that the City, its officers and tow-in agent were functioning in a proprietary capacity under pretense of law and/or office pursuant to an established policy of requiring three or more traffic violations rather than under Ordinance 7110, Section (B), which only requires two (2) or more.

Conclusion.

Petitioner verily believes that he has controverted the objections of respondent and that the question concerning the instant controversy should be resolved by granting the petition for a writ of certiorari.

Respectfully submitted,

GEORGE H. BRASIER, *pro se.*

CERTIFICATE OF SERVICE

I, George H. Brasier, *pro se*, do hereby certify that four (4) copies of the foregoing Reply have been served pursuant to Rule 33 of the Revised Rules of this Court.

GEORGE H. BRASIER, *pro se.*

February, 1960.